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ROYAL COURT
(Samedi Division)

9th February, 1993. 23

Before: The Bailiff and
Jurats Vint and Orchard.

Between: **Fox Marine Services Limited.** **Plaintiffs**

And: **Rodney Buesnel.** **Respondent**

Advocate P.C. Harris for the Plaintiff.
Advocate J. Melia for the Defendant.

JUDGMENT

THE BAILIFF: The plaintiff in this action, Fox Marine Services Limited, are Marine Engineers. The beneficial owner of that company, who also conducts the business, is Mr. John Fox.

The defendant, Mr. Rodney Buesnel, is a fisherman. In December, 1988, he bought a boat called "The Shiralee" which had a 'Lister' engine in it. That engine had originally been supplied to the previous owner by the plaintiff and therefore Mr. Fox knew the engine.

It was agreed between Mr. Buesnel and the plaintiff that the boat would be taken out of the water in August, 1989. In fact, for some reason which was not clear except that Mr. Buesnel told us that he wished to go on fishing because it was a good time of the year, it was not taken out of the water until the 16th or 17th October, 1989.

When the boat was taken out of the water in October, 1989, it was said that this took place at Gorey, in the presence of a Mr.

Lucas, who was somebody who made himself useful to Mr. Buesnel; and at that time and place Mr. Fox undertook to carry out a service on the engine for something between £1,200 and £1,400, as a rough estimate. However, what Mr. Fox said was that the conversation concerning the engine first took place earlier that year, in January, 1989, and he could not give a fixed price at that time until he had at least had an opportunity of looking at the engine.

It was, in fact, at the request of the defendant that the boat was taken out of the water in October, although, as I have said, it was originally intended that the boat should come out of the water in August.

Some work was carried out in December, 1988, by the plaintiff company on the engine and the bill for that work was paid in January, 1989, when, according to Mr. Fox, the figure of £1,800 was mentioned.

The defendant does not dispute the figure of £1,800 but, he says, that figure was all inclusive, that is to say, it included labour and materials. Mr. Fox is quite adamant that that was not so and that in January, 1989, he made it quite clear that it was for labour only and the parts would be additional.

So far as Mr. Lucas is concerned, Mr. Fox does not remember his being there at all. Mr. Lucas himself, although he mentioned the figure of £1,200 to £1,400 admitted he was not involved in the decision, was not paying much attention, and was in the boat itself.

The work was undertaken after the engine had been taken out in October and November. The second point at issue between the parties is the time within which the work was to be completed.

The defendant alleges that the figure was 10 days, possibly a fortnight, but the plaintiff, Mr. Fox, said that it was impossible to fix a time, having regard to what he might find upon stripping the engine and, of course, depending also on the question of supplies and how soon the parts could arrive from the manufacturers. It is interesting to note that Mr. Bunn, who has worked on engines of this sort and is an extremely experienced engineer used a colourful expression and said: "Marine contracts are right swines to cost". Be that as it may, the work was eventually done and Mr. Buesnel took possession of his boat which he kept out of the water for some time during the winter of 1989 to 1990 because that was not the time that he fished.

There is another conflict of evidence between the parties over the period from the end of the work until the summons which gave rise to these present proceedings. Mr. Buesnel said that he went back from time to time to complain about the delay. Mr. Fox denies that and and said that Mr. Buesnel only came back once. Mr. Buesnel left us with the impression, from his evidence, that he was anxious that everything should be done properly and in time and was careful about the price. He liked to pay his way, he said. On the other hand Mr. Fox suggested that Mr. Buesnel was fairly cavalier in relation to money and was prepared to order all sorts of extras even though he was warned from time to time, according to Mr. Fox, that the price would go up and more expense would be incurred; nevertheless Mr. Buesnel appeared to be satisfied with the way things were going.

However, in the course of December, 1989, Mr. Buesnel paid a cheque of £900 which, he told us, was one-half of the £1,800 which he had contracted to pay.

Shortly after that he received a bill which showed a figure considerably in excess of what he had been anticipating in the region of £2,800. He made no further protest about the matter and eventually a summons was issued. The summons was issued on 31st May, 1990, and was returnable in the Royal Court on Friday, 8th June, 1990, and was in the sum of £3,188.96 which was the original price as tendered for the account, plus a certain amount of interest and a further account which had been sent on 4th April, 1990, for a relatively small amount.

On Tuesday, 5th June, 1990, Mr. Buesnel went to the plaintiff's workshop and offered a cheque for the full amount of £3,188.96 and he removed - it is alleged - from the plaintiff's premises, a deckwash pump belonging to him, and which, it is said, the plaintiff had retained pending payment.

The matter came before the Royal Court on 8th June, 1990, and was adjourned for one week to allow the cheque to be cleared. On 11th June, 1990, the plaintiff was told by his bank that the cheque had been countermanded and there followed letters and correspondence between the respective firms of lawyers advising the parties concerning the merits of the case.

Leaving aside the bare history which I have just sketched of the relationships between the parties, the defence to the action is that the plaintiff was in breach of his contractual obligations to the defendant both expressly and implicitly. The particulars were - and I read from paragraph 14 of the amended counterclaim:

> *"(a) Taking five weeks to allegedly effect the said works instead of ten days.*
>
> *(b) Failing to overhaul the gearbox adequately or at all.*
>
> *(c) Failing to overhaul and treat the cylinder block adequately or at all. Further or in the alternative*

failing to advise the defendant to purchase a new engine rather than to repair the old one.

(e) Generally failing to meet the standards required of a reasonably competent marine engineer".

By a strange coincidence on the same day that the summons was issued (31st May, 1990), the defendant had trouble with the gearbox. He says that the fault was due to the wearing of the ferodo lining in the gearbox, and that should have been apparent to the plaintiff company when some work was done on the gearbox earlier in the year. Alternatively, Mr. Fox should have looked at the gearbox more carefully at the time he undertook the examination of the engine, after it had been taken out of the boat in mid-October, 1989.

Mr. Bunn, the engineer, and Mr. Fox gave different explanations. It could be that the engine was put into gear too sharply by the defendant, or that there was some snagging of wood or rope in the propeller which would cause a slipping of the gear.

There is evidence, if we accept it, from Mr. Fox that he took the top off and found the gears in good condition. He did not see the ferodo lining. Mr. Bunn said that if there were no signs of wear or damage once you opened the top of the gearbox, it was best left alone, and unless there was something external to warn you, or you saw something inside, or unless you were asked specifically by the customer, it was best not to strip it down as there were no signs that it was not working properly.

Although Mr. Buesnel had had this trouble with the gearbox, he had no further trouble until he was fishing off St. Catherines on 8th June, 1990. He noticed - according to his evidence - that the oil in the engine was emulsifying and that was an indication, everybody agrees in this case, that water had got into the oil. He had never seen this problem before, he said, because he was

always at great pains before setting out to attend to his pots, or taking the boat out for any other reason, to check the oil level. Mr. Bunn, on the other hand, said that it was unlikely that (and I shall come to the problem of the cylinder in a moment) the emulsifying would have occurred very quickly; it had been building up over a time and the warning signs would have been - had Mr. Buesnel indeed checked his oil as he said he did - a rise in the oil level.

The other complaint by the defendant is that not only was the gearbox not looked at properly as it should have been but, far more importantly, one of the cylinder blocks which was eventually shown to have a flaw (and it has not been proved to us that it was other than a flaw occurring at the time of the manufacture of the block), allowed water to penetrate and caused the emulsifying with the oil. It is said that the plaintiff should have found this flaw; first he should have found signs which the defendant's engineer, Mr. Douthwaite, explained to the Court he would have found had he unscrewed certain core plugs attached to the cylinder block. Mr. Douthwaite to whose firm the defendant took the engine for examination after the emulsifying had been discovered, said that if the core plugs had been removed, Mr. Fox would have found the flaw, or at least found corrosion, which would have led him to suppose that there was damage inside and if that corrosion had been scraped then the flaw, the pinhole due to the corrosion, would have been exposed.

But one must not forget that what is being alleged is not that that was the condition of the cylinder at the time it was examined in October, 1989, but that that was the condition the cylinder was found to be in some six months later, in June, or a little later, of 1990. The defendant has to show, on the balance of probability, that that was the condition of the cylinder in October, 1989, and that it was incumbent upon the plaintiff

company to strip the cylinder in the way we have had described to us most carefully by the engineers and indeed by both parties, for that matter, in a way that placed upon the plaintiff company a duty to ensure that even a flaw of that nature would be exposed. We were told by Mr. Bunn and by Mr. Fox, that the core plugs, contrary to Mr. Douthwaite's evidence, were not there for inspection purposes, but to enable certain manoeuvres to be carried out during the manufacture of the cylinder blocks themselves.

It is pertinent also to recall that Mr. Buesnel had been told to bring the engine back for inspection by Mr. Fox after 25 hours running. He did not do that; nor did he take advantage of Mr. Fox's offer, after the gearbox caused trouble, to have that looked at again in May, 1990; nor did he take advantage of the offer to return the engine and have it looked at after the emulsifying was found. Evidence was given to us by Mr. Bunn and Mr. Fox that that matter could easily have been put right. It would have required a new cylinder but that could have been put in for a relatively small amount of money *in situ* in the boat and the engine would have been good for many hundreds more hours.

So far as the cylinder itself is concerned, Mr. Bunn drew our attention to the fact that it had, as I have said, a flaw. He had never seen one before in his life and it was an exceptional thing for it to be there. There is a conflict of evidence between Mr. Douthwaite and Mr. Bunn, and to a lesser extent Mr. Fox, and where there is such a conflict the Court is quite sure that it is right to prefer the evidence of Mr. Bunn who is a man of greater experience in relation to these particular engines and their particular difficulties than Mr. Douthwaite. That is not to say that Mr. Douthwaite did not do his utmost to assist the Court, but as I say where there is a conflict of evidence, as there was

between these two witnesses, the Court has accepted the evidence of Mr. Bunn.

Therefore the Court has to decide whether - looking at the evidence as a whole and the circumstances - the plaintiffs failed to give the proper service which the defendant was entitled to receive from a competent marine engineer. The Court is quite satisfied that Mr. Fox's firm is a competent marine engineering company and that the service which it carried out was to a proper standard. Accordingly, so far as the counterclaim is concerned, it must fail.

We have already given judgment for the plaintiff on 8th February, 1993, on a technical legal point, (see Jersey Unreported Judgment of that date), and we went on to hear the counterclaim today to see if we should set aside that judgment, which we had stayed. We are not going to set it aside, but we are going to vary it because it seems to us that there is little or no evidence for us to find an agreement either explicit or implicit that there would be interest paid on the amount claimed. There was some doubt about the posting of the work's notice about interest; we had no evidence as to exactly where this was, nor whether a customer could see it. It is true that Mr. Fox said that the question of the interest was added to the works notice before his negotiations over this engine with Mr. Buesnel, but we think it would be unsafe to allow that side of the claim to stand.

Therefore, we reject the counterclaim *in toto* because the breach has not been found to have been substantiated. We therefore confirm our judgment of 8th February, 1993. Mr. Harris, we will give you judgment and we will award you interest from the date on which you issued the summons until today. You will also have your taxed costs.

Authorities

Dalloz: "Répertoire de législation de doctrine et de jurisprudence": Vol. 30 p.p. 542-579.

Oeuvres de Pothier Vol. 1 p.p. 79-86; 107-112; 139-142, and 180-195.

Donnelly -v- Randalls Vautier Limited (19th April, 1991) Jersey Unreported.

Fox Marine Services -v- Buesnel (8th February, 1993) Jersey Unreported.